Supreme Court, U.S.
FILED
08-430 AUG 12 2008
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

MICHAEL EMERSON CORRELL,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

J. D. NIELSEN
Assistant Attorney General
(Attorney of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686

CAPITAL CASE
QUESTIONS PRESENTED

In 2001, pursuant to a remand to address a claim of ineffective assistance of counsel, the district court held a 9-day evidentiary hearing during which it heard testimony from 17 witnesses, 14 of whom were called by Correll, and reviewed voluminous documents. In a detailed 109-page decision issued in 2003, the district court found that Correll was not prejudiced due to any deficient performance on counsel's part.

The Ninth Circuit reversed the decision in 2008, notwithstanding the district court's careful findings. As the dissenting judges noted,

> [t]he panel majority's opinion reweighs the evidence before the district court and reverses its conclusion by ignoring the district court's factual findings as well as the second prong of the *Strickland* test for ineffective assistance of counsel. The majority opinion collapses the two *Strickland* prongs into one prong. The opinion implies that if counsel makes a strategic decision not to investigate or present what it calls "classic mitigating circumstances" that would nonetheless open the door to more damaging aggravating evidence, prejudice will be presumed. . . .

Correll v. Ryan (*Correll V*), ___ F.3d ___, 2008 WL 2039074 (9th Cir. 2008) (Pet. App. A at 3) (Callahan, J., dissenting from denial of rehearing en banc).

1. Did the Ninth Circuit fail to appropriately afford deference to the district court's factual findings?

2. Did the Ninth Circuit essentially eliminate the prejudice prong of the *Strickland* analysis by presuming prejudice, and by failing to consider the facts and circumstances of the offense, the death-qualifying aggravating factors found at trial, Arizona law, and the rebuttal evidence the state would have presented had the alleged omitted mitigation been offered?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES iv
OPINION BELOW vi
STATEMENT OF JURISDICTION vi
CONSTITUTIONAL PROVISIONS vi
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENTS 4
ARGUMENTS 5, 18

I

THE NINTH CIRCUIT FAILED TO DEFER TO THE DISTRICT COURT'S FACTUAL FINDINGS. 5

II

THE NINTH CIRCUIT ESSENTIALLY ELIMINATED THE PREJUDICE PRONG OF THE STRICKLAND ANALYSIS BY PRESUMING PREJUDICE, AND BY FAILING TO CONSIDER THE FACTS AND CIRCUMSTANCES OF THE OFFENSE, THE AGGRAVATING FACTORS FOUND AT TRIAL, ARIZONA LAW, AND THE REBUTTAL EVIDENCE THAT THE STATE WOULD HAVE PRESENTED HAD THE ALLEGED OMITTED MITIGATION BEEN OFFERED 18

CONCLUSION 27
APPENDIX A A-1
APPENDIX B B-1

TABLE OF AUTHORITIES

CASES ..... PAGE

Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005) 18
Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 7
Bernard Smith v. Stewart, 140 F.3d 1263 (Ariz. 1998) 14
Burger v. Kemp, 483 U.S. 776 (1987) 24
Correll v. Ryan (Correll III), 465 F.3d 1006 (9th Cir. 2006) ..... vi, 2
Correll v. Ryan (Correll IV), CV 87–1471–PHX–SMM (Pet. App. B) 3, 5, 10, 13, 16, 17, 24, 25
Correll v. Ryan (Correll V), ___ F.3d ___, 2008 WL 2039074 (9th Cir. 2008) ..... vi, 2, 3, 7, 8, 11, 12, 14, 16, 18, 19, 21, 24, 26
Correll v. Stewart (Correll II), 137 F.3d 1404 (9th Cir. 1998) vi
Cuyler v. Sullivan, 466 U.S. 335 (1980) 20
Darden v. Wainwright, 477 U.S. 169 (1986) 24
Inwood Laboratories, Inc. v. Ives laboratories, Inc., 456 U.S. 844 (1982) 7
Ring v. Arizona, 536 U.S. 584 (2002) 1
State v. Bishop, 622 P.2d 478 (Ariz. 1980) 23
State v. Correll (Correll I), 715 P.2d 721 (Ariz. 1986) ..... vi, 1, 21, 22
State v. Gerlaugh, 698 P.2d 694 (Ariz. 1985) 23
State v. Hoskins, 14 P.3d 997 (Ariz. 2000) 23
State v. Jackson, 918 P.2d 1038 (Ariz. 1996) 23
State v. Medrano, 914 P.2d 192 (Ariz.1996) 14
State v. Murdaugh, 97 P.3d 844 (Ariz. 2004) 22
State v. Vickers, 633 P.2d 315 (Ariz. 1981) 23

Strickland v. Washington, 466 U.S. 668 (1984)....4, 6, ...15, 18-22, 27
United States v. Cronic, 466 U.S. 648 (1984) 20
United States v. Real Estate Boards, 339 U.S. 485 (1950).....7
Wiggins v. Smith, 539 U.S. 510 (2003).....4, 18, 20

Statutes

A.R.S. § 13-703(G)(1).....17

Rules

Rule 52(a) Fed. R. Civ. P.....6
Rule 52(a)(6), Fed. R. Civ. P. 6

Constitutional Provisions

U.S. Const. amend VI .....vi, 1, 20, 27
U.S. Const. art. III, 2 vi
28 U.S.C. § 1254(1).....vi

OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Judges Thomas and Schroeder) held, in an amended opinion, that Correll is entitled to be resentenced based upon trial counsel's alleged deficient performance and resulting prejudice. Judge O'Scannlain dissented. *Correll v. Ryan* (*Correll V*), ___ F.3d ___, 2008 WL 2039074 (9th Cir. 2008) (Pet. App. A). The panel opinion reversed a decision by the United States District Court for the District of Arizona. *Correll v. Ryan* (*Correll IV*), CV 87–1471–PHX–SMM (Pet. App. B). *See also Correll v. Ryan* (*Correll III*), 465 F.3d 1006 (9th Cir. 2006); *Correll v. Stewart* (*Correll II*), 137 F.3d 1404 (9th Cir. 1998); *State v. Correll* (*Correll I*), 715 P.2d 721 (Ariz. 1986).

STATEMENT OF JURISDICTION

On May 14, 2008, the Ninth Circuit denied Petitioner's petition for rehearing en banc. Chief Judge Kozinski, and Judges Callahan, O'Scannlain, Kleinfeld, Tallman, Bea dissented. (*Correll V*, Pet. App. A). This petition for writ of certiorari is timely filed within 90 days of that decision, and this Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

STATEMENT OF THE CASE

Following a jury trial, Correll was convicted of three counts of first-degree murder, four counts of kidnapping, one count of armed robbery, and one count of first-degree burglary, in connection with the 1984 execution-style murders of Robin Cady and Shawn D'Brito, the strangulation death of Debra Rosen, and the attempted murder of Guy Snelling.

The trial court found the existence of four aggravating, death-qualifying circumstances: (1) Correll had previously been convicted of a violent felony; (2) the offenses had been committed in expectation of pecuniary gain; (3) the murders were committed in an especially cruel, heinous or depraved manner; and (4) the offenses constituted a series of multiple homicides.[1] The trial court concluded that the mitigation evidence was insufficient to call for leniency, and sentenced Correll to death on the murder counts, and to terms of imprisonment on the remaining counts.

On direct appeal, the Arizona Supreme Court found that the record did not support a finding that Correll intended to kill victim Debra Rosen, and modified Correll's sentence for Rosen's murder from death to life imprisonment. *Correll I,* 715 P.2d. at 730–31. With regard to the two other murder convictions, the court

---

[1] Correll's case was final before the Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Court held that the Sixth Amendment requires, in most cases, jurors to find at least one death-qualifying aggravating factor.

affirmed the existence of three of the aggravating factors found by the trial court, but denied the multiple homicides aggravator, finding that the aggravator became effective after the crimes were committed, but before Correll was sentenced. *Id.* at 734–35. After conducting both an independent review of the aggravating and mitigating circumstances, as well as a proportionality review, the court affirmed Correll's death sentences with respect to the murders of Robin Cady and Shawn D'Brito. *Id.* at 731–38.

In 1987, Correll filed a petition for post-conviction relief, asserting multiple violations of his constitutional rights, including his right to effective assistance of counsel during the guilt and penalty phases of trial. *See Correll III*, 465 F.3d at 1009. The trial court summarily denied his petition, and the Arizona Supreme Court summarily denied review. *Id.*

Correll then filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, raising 53 claims of constitutional violations at trial, sentencing, and direct appeal.[2] *Id.* The district court found 26 of Correll's claims were procedurally barred, and granted summary judgment against him on the remaining counts. *Id.*

In 1998, a panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, except for Correll's contention that he was entitled to an evidentiary hearing on his claim of

---

[2] Correll filed his petition prior to the effective date of the AEDPA. (*See Correll V*, Pet. App. A, A-25).

ineffective assistance of counsel at the sentencing phase of trial. The panel remanded the matter to the district court with instructions to hold an evidentiary hearing on the claim. *Id.*

On remand, the district court conducted a 9-day evidentiary hearing in 2001, and found that Correll had failed to prove that he was prejudiced from any deficient performance on the part of sentencing counsel. (*See Correll IV*, Pet. App. B).

In 2006, a panel of the Ninth Circuit held, in a 2–1 decision, that Correll was entitled to be re-sentenced based on trial counsel's alleged deficient performance and resulting prejudice, reversing the district court. *See Correll III.* Petitioners subsequently filed a petition for rehearing en banc, which was denied 19 months later by a majority of the non-recused active judges of the Ninth Circuit. Six Circuit Court judges dissented from the denial of rehearing. (*See Correll V*, Pet. App. A).

Concomitantly with the filing of the denial of Petitioners' petition for rehearing en banc, the original panel elected to file an amended opinion, in which Judges Thomas and Schroeder once again held, over Judge O'Scannlain's amended dissent, that Correll was entitled to be resentenced. *Id.*

SUMMARY OF ARGUMENTS

1. The Ninth Circuit failed to appropriately defer to the district court's factual findings. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)"). This deference requirement is especially compelling in cases involving claims of ineffective assistance of counsel, in which a court must, in conducting its prejudice analysis, necessarily assess the strength and reliability of the proffered evidence, a function best undertaken by the court which presided over the hearing at which the evidence was presented.

2. The Ninth Circuit essentially eliminated the prejudice prong of the *Strickland* analysis. The panel's erroneous legal holding, that *Wiggins v. Smith*, 539 U.S. 510 (2003) created a presumption of prejudice with respect to certain types of omitted mitigation, is contrary to the jurisprudence of this Court. The panel's failure to consider the facts and circumstances of the offense, the death-qualifying aggravating circumstances, the rebuttal evidence that the state would have presented had the additional allegedly mitigating evidence been offered, and Arizona law, is contrary to this Court's Sixth Amendment jurisprudence with respect to the right to effective assistance of counsel.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

THE NINTH CIRCUIT FAILED TO DEFER TO THE DISTRICT COURT'S FACTUAL FINDINGS.

Pursuant to the Ninth Circuit's 1998 remand, the district court held a 9-day evidentiary hearing in 2001, during which it heard testimony from 17 witnesses and reviewed voluminous documents. In a detailed 109-page decision issued in 2003, the district court found that trial counsel's performance had been deficient regarding only two matters. First, the district court held:

> [T]he Court reluctantly and narrowly concludes that [counsel's] performance was deficient because he failed to review Petitioner's mental health records . . . before making sentencing strategy decisions.

(*Correll IV*, Pet. App. B at 25). Second, the district court "narrowly conclude[d]" that counsel should have obtained the medical treatment records concerning the head injury Correll suffered when he was seven years old. (*Id.* at 29).

The district court rejected Correll's other challenges to counsel's performance,[3] including his contention that counsel had improperly failed to present mitigating

---

[3] (*See Correll IV*, Pet. App. B at 15–17, 40–46).

evidence concerning Correll's use of illegal drugs. (*Id.* at 30–40).

Addressing the prejudice prong of the *Strickland* analysis, the district court held that Correll was not prejudiced by counsel's failure to review his mental health records, because Correll's proffered mental health evidence was "not entitled to significant mitigating weight"—there was "no credible evidence that [Correll's] personality disorder or his mild depression impaired his capacity or significantly influenced his behavior at the time he committed the crimes." (*Id.* at 60), citation to the record omitted). The district court further found that any potential prejudice was also "eclipsed by the overwhelming rebuttal evidence of specific bad acts of an aggravating nature." (*Id.* at 60–61). The district court similarly concluded that Correll was not prejudiced by counsel's failure to obtain his medical records because, based upon the evidence presented, Correll "did not suffer any brain injury from the block wall that fell on him when he was 7 years old." (*Id.* at 63).

The district court's conclusions are entitled to deference:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Federal Rules of Civil Procedure Rule 52(a)(6). *See also Strickland*, 466 U.S. at 698 ("district court findings are

subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)"). Under the "clearly erroneous" standard set out in Rule 52(a)(6), "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'" *Inwood Laboratorites, Inc. v. Ives laboratories, Inc.*, 456 U.S. 844, 857–58 (1982) (quoting *United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950)).

To determine whether a petitioner "has met [this] burden of showing that the decision reached would reasonably likely have been different absent the errors," *id.* at 696, a court addressing a claim of ineffective assistance of counsel must necessarily assess the strength and reliability of the proffered evidence, a function best undertaken by the court which presided over the hearing at which the evidence was presented. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574–575 (1985).

The panel majority ignored this fundamental rule. In his amended dissent to the panel's opinion, Judge O'Scannlain notes the "sharp divergence between the majority's presentation of the facts and the district court's factual findings." (*Correll V,* Pet. App. A at 51 n.1)). Similarly, in her dissent to the denial of rehearing en banc, Judge Callahan concludes:

> Here, the district court held a nine-day evidentiary hearing and made detailed findings of fact on remand from this court. We abuse our

> role as an appellate court when we cavalierly ignore the findings that a district court makes on remand. . . . The majority, in pursuing "some mitigating evidence [that] could have spared Correll's life," fails to appreciate—as it is required to—that the district court's contrary position is reasonable and entitled to deference.

(*Id.* at 14–15).

The dissenters' criticism is apt—the panel's improper substitution of its independent interpretation of the evidence heard by the district court is demonstrated numerous times throughout its decision. For example, to support its finding that Correll was prejudiced due to counsel's failure to investigate and present evidence concerning his childhood head injury, the panel states:

> When Correll was seven, a brick wall collapsed on his head. Although he was unconscious for some time after the accident, his parents did not seek medical treatment until several days later when he was still not back to normal. Several experts testified that this type of accident and the symptoms Correll exhibited then and now indicate a high likelihood of brain impairment.

(*Correll V*, Pet. App. A at 43, footnote omitted). This independent assessment of the evidence concerning Correll's injury differs significantly from the district court's detailed factual findings:

[P]etitioner received a head injury on April 8, 1967, when he was 7, at which time his parents took him to see their family doctor. Four days later, Petitioner was vomiting and again taken to the family doctor where an X-ray was taken and an EEG scheduled. On April 14, 1967, an EEG was done. On April 15, in response to more vomiting, Petitioner's parents took him to the emergency room at Children's Hospital of Los Angeles. At the hospital, he was seen by a treating physician, who diagnosed a subgaleal hematoma, which is a bruise or collection of blood under the scalp, but above the skull. The treating physician recommended a neurosurgery consultation, which was done. The doctor in the neurosurgery clinic also diagnosed Petitioner with a subgaleal hematoma. On May 3, 1967, Petitioner was brought back to the neurosurgery clinic for a follow-up visit. The follow-up visit noted that Petitioner's hematoma cleared in 5 days and that Petitioner was alert and well.

. . .

Dr. Anne Herring, Petitioner's neuropsychologist, performed neuro-psychological testing upon Petitioner to assess his cognitive functioning and whether he has any brain injury. For the vast majority of tests (30 out of 33 tests), Petitioner's scores were average to high average. Dr. Herring identified 3 tests where Petitioner had difficulty. Dr. Herring opined that Petitioner had severe difficulty on one test measuring his central information

processing capacity. Based on her testing, Dr. Herring testified that Petitioner's performance suggests some degree of brain dysfunction and problems with impulse control. Dr. Herring further opined that Petitioner's history of dysfunctional behavior suggests a possibility of prefrontal lobe brain impairment. Finally, she noted that his dysfunctional behavior is exacerbated by the ingestion of recreational drugs and alcohol.

Respondents presented a report and testimony from Dr. Daniel Martell, a neuropsychologist. Dr. Martell tested petitioner after Dr. Herring and had the benefit of her report. Dr. Martell focused his testing on assessing areas of possible impairment, Petitioner's visual perceptual skills, his visual memory and executive functioning. Dr. Martell concluded that there is evidence that Petitioner has isolated neuropsychological impairments or deficits characterized by mild impulsivity and difficulty with selective attention. However, those isolated impairments did not generalize to Petitioner's overall ability to organize, plan and control his behavior. Regarding his frontal lobe ability, Dr. Martell testified that there is significant variability. In some areas he [Correll] is "absolutely genius" and in others average to above average, and in still another there is mild to moderate deficit. Overall, Dr. Martell characterized Petitioner as only having very mild impairment and that of all the capital defendants he has tested, Petitioner is one of the

> highest functioning defendants. The Court requested clarification, and asked how it should view a finding of mildly brain impaired. Martell opined that "*it's a very minor finding.*"

(*Correll IV*, Pet. App. B at 61–63), emphasis added, citations to the record omitted). From this factual record, the district court concluded:

> Based on testimony received from neuropsychologists, the Court concludes that Petitioner did not suffer any brain injury from the block wall that fell on him when he was 7 years old. The Court specifically finds that Petitioner does suffer from some mild brain impairment or deficit. The Court adopts Dr. Martell's finding that it is a minor impairment and does not generalize to Petitioner's overall ability to organize, plan and control his behavior. The Court further adopts the finding of Dr. Martell that, when subjected to neuropsychological testing, most everyone suffers some level of deficit or impairment. The Court is unable to determine the origin of Petitioner's mild impairment. Petitioner did not demonstrate any brain damage or that his mild brain deficit or impairment was a factor in the murders.

(*Id.* at 63, citations to the record omitted).

The panel majority attempts to justify its questionable independent interpretation of the evidence by asserting:

> [I]n the procedural context of this case, the district court's role was not to evaluate the evidence in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof). The district court should have decided only whether there existed a "reasonable probability" that "an objective fact-finder" in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes.

(*Correll V*, Pet. App. A at 43 n.6, citation omitted.)

This explanation for the panel's disregard of the district court's factual findings is not persuasive. Obviously implicit in the district court's findings is a determination that there was no reasonable probability that "'an objective fact-finder' in a state sentencing hearing" would have found "that Correll had a brain injury that impaired his judgment at the time of the crimes."

The panel's improper disregard of the district court's factual findings is further demonstrated by its independent analysis of the evidence regarding Correll's use of methamphetamine:

> Perhaps more compellingly, the evidence of Correll's methamphetamine use on the night of the crimes, had it been fully presented, could have risen to the level of a statutory mitigator. Under Arizona law, gross intoxication at the time of the crime constitutes a statutory mitigator if that intoxication impaired the

> defendant's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." A.R.S. § 13-703(G)(1). There was undisputed evidence adduced at the evidentiary hearing that Correll was addicted to methamphetamine, that Correll used some methamphetamine on the day of the crime, that Correll habitually used methamphetamine in astonishingly and unusually high dosages, and that drug addicts generally are incapable of using their drug of choice in any dosage that is lower than their usual dosage. Thus, the evidence strongly indicated that Correll used an extremely high dosage of methamphetamine on the day of the crime.

(*Correll V*, Pet. App. A at 46–47).

The panel's view of the evidence, which ignores the fact that Correll did not testify at the evidentiary hearing and refused to cooperate with the State's drug abuse expert, is in marked contrast to that of the district court which, after hearing the evidence first hand, found that Correll had failed to prove that he was intoxicated when the victims were murdered, specifically noting:

> Absent other evidence in support or proof by Petitioner, the Court will not assume that Petitioner was intoxicated when the crimes were committed. Rather, the evidence shows that it was Petitioner who remained calm when the gun misfired as Nabors was trying to kill Robin

> Cady. It was Petitioner who encouraged Nabors to remain calm as there were no cars coming, to get a shell chambered and shoot Cady. Such behavior at the time of the crime does not demonstrate intoxication and, in fact, undercuts an assertion of intoxication.

(*Correll IV*, Pet. App. B at 69, internal citation omitted).

The panel attempts to explain its refusal to defer to these factual findings of the district court by asserting that the district court's conclusion, that Correll was not intoxicated when the victims were murdered, was based upon "a critical misunderstanding" of the evidence:

> At the evidentiary hearing, expert testimony made it clear that gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers. The experts described a state known as "methamphetamine blackout," during which the user would be capable of performing complex tasks but would be incapable of understanding or remembering his behavior. One of the experts, a recovered methamphetamine addict, specifically confirmed the possibility that "those observing a person in a methamphetamine blackout [wouldn't] know that the person is in a methamphetamine blackout." This evidence severely undermines the propriety of the district court's reliance on witness observation in concluding that Correll was not intoxicated on

> the night of the crimes. Those witnesses might not have known whether Correll was intoxicated or not.

(*Correll V*, Pet. App. A at 47).

However, the panel ignores the fact that no credible evidence was presented at the hearing to corroborate Correll's self-serving claim that he was under the influence of methamphetamine when the victims were murdered. As the district court found:

> The Court does not credit [Correll's] unsubstantiated self-report that he abused methamphetamine every day before the crimes were committed. Petitioner chose not to testify at the evidentiary hearing; Petitioner chose not to fully cooperate with [the government's drug abuse expert's] examination of him regarding the issue of drug abuse. Because of the obvious motive to fabricate, Petitioner's self-serving statements about his drug usage prior to the crimes is [sic] unreliable and subject to searching skepticism. *See, e.g.*, [*State v.*] *Medrano,* 914 P.2d [192,] 227 [(Ariz.1996)] ("the defendant provided most of the information concerning his use of cocaine in the past and on the night of the murder, as well as the drug's effect on him. Because of the obvious motive to fabricate, such self-serving testimony is subject to skepticism and may be deemed insufficient to establish mitigation.")]; *see also Bernard Smith* [*v. Stewart*], 140 F.3d 1263,] 1270 [(Ariz. 1998)] (evaluating evidence based on impartial

sentencing judge applying Arizona law); *see generally, Strickland,* 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). The Court's searching skepticism toward Petitioner's self report is corroborated by Respondent's drug abuse expert, Dr. Matthews, who opined as follows: "Antisocial personality disorder is characterized by malingering and deceit; instances of [Petitioner's] lifelong pattern of deceptiveness abound throughout his penal and other records. He has been deceitful about a great many matters, including his history of substance abuse. Because of [Petitioner's] history of deceit, it is a major clinical error to accept [Petitioner's] self-serving view of his condition at the time of the offense as accurate."

Based on [counsel's] testimony, it appears that Petitioner may have abused some unknown amount of methamphetamine on the days prior to April 11, 1984. However, at the evidentiary hearing, Petitioner did not prove such usage.

For the day before the crimes, the Court credits Robin Correll's testimony that she witnessed Petitioner inject himself with methamphetamine in the morning. However, her failure to testify at sentencing was not prejudicial to Petitioner as [counsel] could not have had Robin testify due to the inculpatory information she had regarding his whereabouts

> at the time of the crime.[4] The Court finds that there was no other evidence presented that Petitioner was intoxicated or under the influence of methamphetamine the day before the crimes were committed. Absent other evidence in support or proof by Petitioner, the Court will not assume that Petitioner was intoxicated when the crimes were committed. . .

(*Correll IV*, Pet. App. B at 67–69), internal citations omitted).

Another example of the panel's refusal to defer to the district court's factual findings concerns Correll's psychological history. The panel states:

> Correll was committed to psychiatric institutions at least twice during his teen years and was described at age 16 as "severely psychologically impaired." He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and he attempted suicide on two occasions. However, there is no evidence that Correll continued to receive treatment after these stays.

(*Correll V*, Pet. App. A at 44–45).

The panel's summary of Correll's psychological history is once again at odds with the district court's

---

[4] (*See Correll IV*, Pet. App. B at (40); *see also* discussion *infra*).

assessment of the evidence it heard. Based upon that evidence, the district court found that, although Correll "established a history of mental health commitments to psychological facilities when he was a minor," there was "insufficient evidence to support that Petitioner has ever suffered from any major mental illness, whether PTSD [post traumatic stress disorder], a major depressive disorder, or a bipolar disorder." (*Correll IV*, Pet. App. B at 58–59). The district court reached this conclusion after two psychological experts testified that there was no evidence Correll has ever suffered from any significant mental disorder. (*Id.* at 58). The sole mental health expert who speculated that Correll might have suffered from PTSD conceded that such a diagnosis was "only a possibility." (*Id.* at 56).

The district court also found that the evidence did not support Correll's contention, adopted by the panel, that he was given anti-psychotic medications while in custody. In reaching this factual finding, the district court noted that mental health experts for both parties scrutinized Correll's medical records from the California Department of Corrections and reported the absence of any indication that Correll was ever treated with anti-psychotic medication. (*Id.* at 55). Although Correll contended that he had been treated with a dosage of 25 milligrams of the drug Mellaril for a period of time as a juvenile, the government's mental health expert testified, without opposition, that at that dosage the drug would have served only as a mild tranquilizer. (*Id.* at 54 & n.41).

The panel fails to explain why it chose to ignore these factual findings made by the district court regarding Correll's psychological history.

The panel's failure to afford deference to the district court's factual findings is contrary to this Court's jurisprudence, and to the Federal Rules of Civil Procedure, as well. Establishing a line of Ninth Circuit authority abrogating this duty of deference would lead to secondary trials in the court of appeals, which "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson*, 470 U.S. at 575.

II

THE NINTH CIRCUIT ESSENTIALLY ELIMINATED THE PREJUDICE PRONG OF THE STRICKLAND ANALYSIS BY PRESUMING PREJUDICE, AND BY FAILING TO CONSIDER THE FACTS AND CIRCUMSTANCES OF THE OFFENSE, THE AGGRAVATING FACTORS FOUND AT TRIAL, ARIZONA LAW, AND THE REBUTTAL EVIDENCE THAT THE STATE WOULD HAVE PRESENTED HAD THE ALLEGED OMITTED MITIGATION BEEN OFFERED.

A. *Failure to require Correll to prove prejudice.*

After improperly substituting its independent interpretation of the evidence for that of the district court, the panel failed to follow the prejudice analysis dictated by this Court in *Strickland.*

Finding that counsel performed deficiently because he failed to present evidence of Correll's alleged abusive childhood, his childhood head injury, his abuse of alcohol and illicit drugs, and his alleged psychological problems,[5] the panel concluded:

> In sum, there was a substantial amount of mitigating evidence available, which, taken together, is sufficient to raise a presumption of

---

[5] (*Correll V*, Pet. App. A at 43–45.)

prejudice under the Supreme Court's standard in *Wiggins*, 539 U.S. at 534–38.

(*Correll V*, Pet. App. A at 45).

This analysis conflicts with this Court's jurisprudence. As Judge O'Scannlain noted in dissent:

> More alarming than its reconstruction of the record, however, the majority jumps with startling speed from its new factual determination that Correll received ineffective assistance of counsel to its ultimate conclusion that his habeas petition must be granted. In so doing, the majority ignores *Strickland's* second requirement, that even if Correll proves ineffective assistance of counsel, he must also prove that the result was actually prejudicial. *Wiggins*, 539 U.S. at 534 (citing *Strickland*, 466 U.S. at 692). As the Supreme Court has made clear, we do not presume prejudice from counsel's ineffective assistance. *Strickland*, 466 U.S. at 693. Rather, even if counsel's performance was deficient, Correll still bears the "highly demanding and heavy burden of establishing actual prejudice." *Allen* [*v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005)] (internal quotation marks omitted) (emphasis added). This burden "affirmatively [to] prove prejudice" requires Correll to show more than the mere possibility that counsel's performance prejudiced the outcome. *Strickland*, 466 U.S. at 693. Instead, Correll must demonstrate "a reasonable probability" that, but for counsel's

> constitutionally deficient performance, he would have received a lesser sentence. *Id.* at 695.

(*Id.* at 58–59) (O'Scannlain, dissenting). Judge O'Scannlain's observations are correct.

Contrary to the panel's assertion, and as Judge O'Scannlain correctly observed, this Court has never held that the failure to present certain types of mitigation raises a presumption of prejudice. Rather, in *Wiggins* the Court reaffirmed that, except in rare cases,[6] it is the defendant's burden to prove prejudice:

> In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland*, 466 U.S., at 692, 104 S.Ct. 2052. In *Strickland*, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052.

Wiggins, 539 U.S. at 534.

The Ninth Circuit's ruling that *Wiggins* creates a

---

[6] In the context of the Sixth Amendment right to effective counsel, this Court presumes prejudice in two limited circumstances, neither of which is present here: (1) where there is a complete denial of the right to counsel; and (2) where counsel labors under an actual conflict of interest. *Strickland*, 466 U.S. at 692 (citing *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984); and *Cuyler v. Sullivan*, 466 U.S. 335, 345–50 (1980)).

presumption of prejudice is incorrect and should be corrected by this Court.

B. *Failure to consider the facts and circumstances of the crimes, the death-qualifying aggravating circumstances proved at trial, and relevant Arizona law.*

In its analysis leading to its alternative finding that Correll proved prejudice, the panel fails to even mention, much less consider, the facts and circumstances of Correll's crimes. (*Correll V*, Pet. App. A at 42–50). This is contrary to this Court's jurisprudence. *See Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). Moreover, the panel's error here was especially egregious given the brutal and disturbing nature of the murders:

> Snelling, Cady and D'Brito [the victims] must have been in great fear about their ultimate fate. Nabors had a gun, which he often lent to defendant [Correll], and additionally, defendant armed himself with a kitchen knife. Each victim was bound with duct tape, and this occurrence must have caused each victim great distress. This fear and worry must have greatly increased when they were loaded into Cady's car and driven into the desert. At no time could they be certain what these two armed men intended beyond robbery. In the desert, each victim was laid on the ground. Snelling was shot first, D'Brito was second, and then Cady was shot

> last. Therefore, Cady and D'Brito both witnessed the shooting of Snelling and must have realized they would be next. Cady further suffered because the gun misfired a couple of times before Nabors succeeded in killing her.

Correll I, 715 P.2d at 733–34.

Moreover, the Ninth Circuit panel compounded its error by additionally failing to consider the three death-qualifying aggravating factors found by the Arizona Supreme Court: (1) Correll's prior felony conviction involving the use or threat of violence against another person; (2) the fact that the murders were committed for pecuniary gain; and (3) the fact that the murders were committed in a cruel, heinous, or depraved manner. *Correll I*, 715 P.2d at 731–34. *See, e.g., Strickland*, 466 U.S. at 700 ("Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.").

The panel also failed to consider Arizona law in making its alternative finding of prejudice. Once again, this is contrary to this Court's jurisprudence:

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694–95. The alleged omitted mitigation that the panel found so compelling—

Correll's personality disorder, his alleged drug addiction, his past psychological and medical history, and his dysfunctional family—would likely be afforded little mitigating weight under Arizona jurisprudence, both as it existed at the time of Correll's sentencing, as well as currently, because Correll failed to demonstrate any causal nexus between this proffered evidence and the crimes he committed. *See, e.g., State v. Murdaugh*, 97 P.3d 844, 860 ¶¶ 81–82 (Ariz. 2004) (drug impairment, personality disorder, and paranoia not afforded significant mitigating weight where there was no proven causal nexus between the proffered evidence and the defendant's crimes); *State v. Hoskins*, 14 P.3d 997, 1021–23 ¶¶ 107–18, (Ariz. 2000) (antisocial or borderline personality disorder, and dysfunctional family history, found not significantly mitigating in absence of causal link to crime). *See also State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985); *State v. Vickers*, 633 P.2d 315, 325 (Ariz. 1981); *State v. Bishop*, 622 P.2d 478, 482 (Ariz. 1980). Additionally, Arizona sentencers typically afford little mitigating weight to evidence of a dysfunctional or abusive childhood. *See, e.g., State v. Jackson*, 918 P.2d 1038, 1049 (Ariz. 1996) ("We are well aware that children who are emotionally and physically abused are adversely affected to some extent for the rest of their lives. Our criminal dockets are filled with such people. But we have never reduced a defendant's death sentence on such a basis").

C. *Failure to consider the rebuttal evidence that the state would have presented had the alleged omitted mitigation been presented.*

The panel decision overlooks the fact that presenting the additional mitigation evidence would have opened the door to extremely damaging rebuttal evidence. In dissent, Judge O'Scannlain notes:

> [T]he majority's conclusion that Correll has met the heavy burden of demonstrating actual prejudice ignores a mountain of precedent which requires us to consider not only the benefits of the ostensibly mitigating evidence counsel failed to present, but also its potential drawbacks. . . . The majority fails to realize that . . . much of the new mitigating evidence Correll offers would have enabled the prosecution to present very damaging evidence in rebuttal.

(*Correll V*, Pet. App. A at 60–61), O'Scannlain, J. dissenting).

Judge O'Scannlain's observations are well taken. For example, had Correll offered his mental health records in mitigation, the State would have used those same records to show that while "undergoing mental health treatment, he raped a female psychotic patient," he had escaped "numerous times" from health treatment facilities, that during one escape attempt, Correll "took hostages by the use of a butcher knife and letter opener, which resulted in one of the hostages having a heart attack," and that "on numerous occasions, [Correll] turned down institutional efforts to provide him with mental health treatment." (*Correll IV*, Pet. App. B. at 60–61). *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776 , 793 (1987) (counsel's failure to present psychological records did not amount to ineffective

assistance because the records suggested "violent tendencies" that would have undermined counsel's strategy of portraying petitioner's actions as the result of another person's "strong influence upon his will").

Similarly, Correll's proffer of the testimony of his mental health expert, Dr. Becker, concerning her opinion whether Correll's crimes might be attributable to his dysfunctional family, "would have produced a doubled-edged dilemma," opening the door to extremely damaging rebuttal testimony that Correll "regularly participated in incest by sexually molesting his sister Robin." (*Id.* at 80). *Cf. Darden v. Wainwright*, 477 U.S. 168, 186 (1986) ("Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions.").

Additionally, had Correll offered the testimony of his sister, Robin, at sentencing, in order to bolster his claim that he was under the influence of methamphetamine when the victims were murdered,

> she could have been cross-examined about her knowledge of Petitioner's whereabouts at the time of the crimes. Had Robin testified concerning Petitioner's conversations about his need to leave town quickly, she would have disclosed that Petitioner was with John Nabors [Correll's accomplice] and had wanted an immediate ride out-of-state very soon after the murders occurred. Such testimony would have totally eliminated any mitigating weight from Petitioner's claim of innocence and residual

> doubt (i.e., the guilt phase misidentification defense).

(*Correll IV*, Pet. App. B at 33–34).

Thus, much of the new evidence proffered by Correll would not have been helpful, because it would have "opened the door" to potentially devastating rebuttal evidence.

As Judge Callahan succinctly observed:

> This case presents an instance in which counsel's instinct that an investigation into Correll's medical and mental history would not yield any positive evidence, although an unacceptable reason for not conducting an investigation turns out after 17 years, a full investigation, and a 9-day evidentiary hearing, to have been correct. The panel majority does not really deny that there is no positive evidence, but argues that evidence concerning Correll's alleged brain damage, sociopathic or antisocial personality disorder, drug use, and troubled family, constitute "classic mitigating circumstances." The second prong of the Strickland test, however, does not call for an abstract analysis of what might be mitigating evidence, but a determination of whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.
>
> . . .

> The record in this case clearly shows that the presentation of evidence of Correll's alleged brain damage, sociopathic or antisocial personality disorder, drug use, and troubled family would not have made any difference to the trial judge or the Arizona Supreme Court. This conclusion is solidly based on the horrific nature of the murders, the applicable constitutional and state law as it existed when Correll was tried, the perceived nature of the trial judge's jurisprudence, and the incredibly damaging nature of the rebuttal evidence. . . .

(*Correll V*, Pet. App. A at 20–22, Callahan, J., dissenting from denial of rehearing en banc).

This Court should grant certiorari review because, left uncorrected, the panel's erroneous legal holdings will establish Ninth Circuit authority to the effect that: (1) a petitioner need not prove prejudice; and (2) a reviewing court need not consider the facts and circumstances of the offense, the death-qualifying aggravating circumstances found at trial, local law governing the decision-making of the trial court, or whether presenting the alleged omitted mitigation would "open the door" to damaging rebuttal. Such a result is not only contrary to *Strickland*, but it undermines the Court's entire Sixth Amendment jurisprudence with respect to the right to effective counsel, effectively eliminating the prejudice prong of the *Strickland* analysis.

CONCLUSION

Based upon the foregoing arguments, the petition for a writ of certiorari should be granted.

Respectfully submitted

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

J. D. NIELSEN
Assistant Attorney General
(Attorney of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686